Supreme Court, U.S.
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No. 02-47

In The
Supreme Court of the United States

THE MAYOR & CITY COUNCIL OF BALTIMORE,
a Municipal Corporation,

Petitioner,

v.

STATE OF WEST VIRGINIA, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

1. Appellee, State of West Virginia, is one of the fifty states of the United States of America.

2. Appellee, Michigan School Class Action, is a class of Michigan public and private schools, certified as a class action by the Wayne County Circuit Court in Case No. 84-429634-NP, none of the members of which are a publicly owned corporation.

3. Appellee, B.C. Hydro, is a Crown corporation owned by the Province of British Columbia, Canada.

None of the above-referenced parties is a subsidiary or affiliate of a publicly owned corporation.

There is no publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome.

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REASONS FOR DENYING THE WRIT

None of the reasons asserted by Petitioner to support granting the Writ are sufficient under the provisions of Rule 10(a) of the Rules of the Supreme Court of the United States. Indeed, the primary thrust of the alleged error below is "misapplication of a properly stated rule of law", which is the "substantial compliance" doctrine.

At every step of the way on its march to this Court, Petitioner has attempted to redefine Respondents' basis for the relief granted by the Bankruptcy Court, affirmed by the United States District Court for the Southern District of Ohio and affirmed by the United States Court of Appeals for the Sixth Circuit. Although Respondents contended that they had substantially complied with the Bankruptcy Court's notice requirement to achieve Tier I status, Petitioners have continually asserted that Respondents needed an enlargement of time under Bankruptcy Rule 9006(b). Respondents did not ask for an enlargement of time under Bankruptcy Rule 9006(b) for the specific reason that the notices they sent, which were received by the parties who were to be notified, substantially complied with the notice requirements to elect Tier I status. Respondents' motion filed with the Bankruptcy Court stated:

> "The grounds for this motion are that (1) substantial compliance was achieved by filing with the National Association of Attorneys General ("NAAG") and the Unofficial Committee of Property Damage Claimants and (2) no prejudice has ensued."

(R.6408 (Bk.Ct.) Motion for Waiver, p.1, J.A. #15 p.158-165)

The Bankruptcy Court, District Court and Sixth Circuit unanimously agreed that there was no need to consider an enlargement of time under Bankruptcy Rule 9006(b) since Respondents had asked for relief under the substantial compliance doctrine, therefore obviating the need for a Rule 9006(b) analysis.[1]

In recognizing that the facts of this case supported application of the substantial compliance doctrine, the courts below followed long-standing principles of equity applied by bankruptcy courts and did not violate either the letter or spirit of this Court's decision in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 113 S. Ct. 1489 (1993). Furthermore, Petitioner has not cited any decision of any other federal court which conflicts with the rulings below.

Continuing its unsubstantiated efforts to bring Respondents under the penumbra of Bankruptcy Rule 9006(b), Petitioner incorrectly asserts that the Bankruptcy

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[1] The Sixth Circuit recognized the compatible coexistence between the substantial compliance doctrine and Bankruptcy Rule 9006(b) as follows:

> "These two cases illustrate that the substantial compliance doctrine is not incompatible with the excusable neglect standard for deadline extension. Although neither case held that the substantial compliance doctrine could be used to obviate the need for a Rule 9006(b) time extension, both employed notions of substantial compliance within the framework of Rule 9006(b)'s excusable neglect standard. With post-deadline substantial compliance available as a consideration in the Rule 9006(b) calculus, it is not inconceivable that pre-deadline substantial compliance could also be available to avoid the calculus altogether."

[App.12]

Court's application of the substantial compliance doctrine was: " . . . decreed *sua sponte*." [Pet.15][2] In addition to ignoring the unassailable fact that Respondents requested approval as Tier I participants because they had "substantially complied" with the notice requirement, Petitioner has raised this "*sua sponte*" argument for the first time on appeal to this Court and, therefore, this issue should not be considered.

Likewise, at no time prior to filing the Petition did Petitioner raise any issue under the Equal Protection Clause of the Fifth Amendment to the Constitution of the United States. Besides that procedural defect, the lower courts correctly agreed that Petitioner only lost a "windfall" when Respondents were found in substantial compliance with the notice requirements. That result did not flow from a discriminatory application of the doctrine. On the other hand, severe prejudice to Respondents would have resulted had their claims been relegated to the smaller, limited Tier II fund.

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[2] Petitioner seems to have forgotten that, back in 1999, it agreed that *Respondents* had raised the substantial compliance doctrine in the bankruptcy court. *See* The Mayor and City of Baltimore's Opposition, at page 9. ("The Claimants have also argued that they substantially complied with the Stipulation") The Mayor and City of Baltimore Opposition, p.9, J.A.14 p.137.

I. The Sixth Circuit Applied the Well-Accepted Doctrine of "Substantial Compliance" in Finding Respondents Had Substantially Complied with Notice Requirement in the Bankruptcy Proceeding.

Petitioner incorrectly relies upon this Court's decision in *Pioneer Investments* for the proposition that the time-extension provision of Rule 9006(b) was the *only* basis upon which Respondents could have obtained relief in the Bankruptcy Court. Petitioner contends the lack of reference to *Pioneer Investment* in the Sixth Circuit's opinion somehow demonstrates conflict with that decision and "many federal decisions that have applied the 'excusable neglect' standard under analogous circumstances."[3] Simply put, there was no reason to cite or discuss *Pioneer Investment* to decide the issues in this case.

Indeed, the *Pioneer Investment* decision does not prevent a bankruptcy court from avoiding a Rule 9006(b) determination when the facts support a finding of substantial compliance with a notice provision. The Court in *Pioneer Investment* never addressed the issue of substantial compliance because there the petitioner "failed to file any proofs of claim by the August 3, 1989 bar date." 507 U.S. at 383, 113 S.Ct. at 1452. Here, it is undisputed that the Respondents took sufficient affirmative steps by the deadline to substantially comply with the notice provision, and that all parties to whom notice was to be sent had actual notice of the Respondents' Tier I expectations, well

[3] Curiously, Petitioner cites to no federal decision where the party seeking relief asserted it had "substantially complied" with a procedural requirement.

in advance of the claims processing commencement date. [App.16] Indeed, the *Pioneer Investment* decision expressly noted that Rule 9006(b) was intended to " . . . govern the permissibility of late filings in Chapter 11 bankruptcies." 507 U.S. at 387, n.4, 113 S.Ct. at 1494, n.4. Here, there were no late filings to be considered or allowed because Respondents had substantially complied with the notice requirements

Furthermore, the application of the substantial compliance doctrine in the context of determining compliance with notice provisions in the Sixth Circuit and elsewhere, contrary to Petitioner's contention, has been well-accepted. *Sherer v. Construccione Acronauticas, S.A.*, 987 F.2d 1246 (6th Cir. 1993); *BankAmerica Pension Plan v. McMath*, 206 F.3d 821 (9th Cir. 2000); *Straub v. A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994); *In re Riggen*, 102 B.R. 677 (Bankr.W.D.Tenn. 1989); *Borzeka v. Heckler*, 739 F.2d 444 (9th Cir. 1984); *Migraf v. Oliver, (In re Oliver)*, 28 B.R. 420 (B.R.Ohio 1983)

The Sixth Circuit properly distinguished between the concepts of substantial compliance and enlargement of time:

> "Rule 9006(b), however, applies only to the enlargement of time. Here, the Bankruptcy Court did not enlarge Appellees' time to file, but instead determined that they had already timely filed. Indeed, Appellees submitted no filing after the deadline. Consequently, the text of Rule 9006(b) poses no obstacle to the use of the substantial compliance doctrine." [App.10]

The Sixth Circuit correctly noted that bankruptcy courts have broad equitable powers to deal with technical

mistakes, particularly with notice provisions. [App.13-14] In conducting this analysis, the Sixth Circuit *embraced*, rather than "departed" from accepted practice. The so-called "significant policy reasons", asserted by Petitioner, [Pet.13] relating to the nearly 1.5 million bankruptcies filed in 2001 should militate against, rather than favor, granting the Writ. As bankruptcy courts are burdened with greater numbers of filings, maintenance of the discretion to find "substantial compliance" with notice provisions and the like will enable the courts to focus on matters of substance over form and avoid the long, drawn-out battles over compliance with technical requirements like those present in this case.

The opinions of the courts below each correctly recognize the distinction between substantial compliance with a notice provision and the need to apply Rule 9006(b) in situations where parties failed to take any action whatsoever to meet notice requirements in bankruptcy proceedings. All three courts recognized that this was not a case where the movants had done nothing to comply with the notice requirements. The Bankruptcy Court found that: "... the movants were not sitting on their rights and should not be penalized for a misunderstanding, especially when actual notice was received." [App.36] The District Court agreed [App.30], and the Sixth Circuit reiterated that *all* of the parties to whom the notices were to be sent had received actual notice before the Tier I claims process was commenced [App.16]. None of the intended recipients of the notice suffered any prejudice.

The legal precedents applied by the lower courts to the undisputed facts of this case demonstrate no conflict with any decision of this Court or any other federal court,

and provide no basis for favorable consideration of the Petition.

II. Petitioner Erroneously Alleges the Bankruptcy Court Applied the Substantial Compliance Doctrine *Sua Sponte*.

In a desperate, but misguided, effort to find a basis under Rule 10(a) to support its Petition, Petitioner claims that the Bankruptcy Court proceeded *sua sponte* to apply the doctrine of substantial compliance. [Pet.15-16][4] Attempting to elevate form over substance, Respondent repeatedly references the words used in the title of the motion filed by Respondents with the bankruptcy court – requesting that the deadline be waived or modified, all the while ignoring the substance of the argument presented to the bankruptcy court which stated:

> "The grounds for this motion are that (1) substantial compliance was achieved by filing with the National Association of Attorneys General ("NAAG") and the Unofficial Committee of the Property Damage Claimants and (2) no prejudice has ensued."

(R.6408 (Bk.Ct.) Motion for Waiver, p.1, J.A. #15 pp.158-165)

Given this clear expression of the basis upon which relief was requested, it is obvious that the Bankruptcy Court did not proceed *sua sponte*, but acted in response to a specific request for relief by the Respondents:

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[4] Obviously, Petitioner knows this is not true. *See* footnote 2, *supra*.

> "In reviewing the motion at hand, we find that movants have not sought relief from this court under an excusable neglect standard as has been suggested by the opposition. Instead, they have presented arguments under a substantial compliance theory, and it is on that basis that this court has considered the matter." [App. at 33-34]

When Petitioner appealed the Bankruptcy Court's decision to the District Court, it did not raise a claim that the Bankruptcy Court had proceeded *sua sponte*. Therefore, the District Court did not address the issue, although it agreed that the Bankruptcy Court was correct in applying the substantial compliance doctrine.

In its appeal to the Sixth Circuit, Petitioner also failed to raise the "*sua sponte*" issue, simply relying upon its previously unsuccessful argument that only Rule 9006(b) could provide a basis for finding Respondents eligible to participate in the Tier I pool.

The failure to raise the "*sua sponte*" issue below should preclude consideration of that question on appeal. *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868 (1976); *Washington v. Yakima Indian Nation*, 493 U.S. 463, 476 n.20 (1979); *See*, *Tennessee v. Dunlap*, 426 U.S. 312, 314 n.2 and 316 n.3 (1976)

Since it is patently obvious that Respondents sought relief from the Bankruptcy Court based on their "substantial compliance" with the notice requirements, there is no basis to find that the Sixth Circuit departed from any "accepted practice" in affirming the Bankruptcy Court's ruling. As such, this argument provides no basis upon which to grant the Petition.

III. Petitioner's "Equal Protection" Argument, Raised for the First Time on Appeal in its Petition for Writ of Certiorari, Even if Considered, Provides No Basis to Find "Discriminatory Misapplication of the 'Substantial Compliance Doctrine.'"

This Court held in *Park Avenue Investment & Development, Inc. v. Barkheimer, II*, 471 U.S. 1108, 105 S. Ct. 2171 (1985) that equal protection arguments which are raised for the first time before the United States Supreme Court will not be considered when not properly raised in the lower courts. Here, the equal protection claim was not raised at any time in the proceedings below and should not be heard here.

Furthermore, there simply is no basis upon which to conclude that the substantial compliance doctrine was applied in any manner which could have violated the Petitioner's equal protection rights. Simply put, the substantial compliance doctrine was not applied to Petitioner at all. It would be another matter if the Bankruptcy Court had been presented with a factual scenario in which Petitioner had filed notices in the same manner as Respondents, but denied relief to Petitioner while granting it to Respondents. That would be a discriminatory application of the substantial compliance doctrine.

Here, Petitioner only complains about the result of the application of the substantial compliance doctrine. That is not a violation of an equal protection right guaranteed Petitioner by the Fifth Amendment.

While Petitioner is clearly disappointed that it did not realize the "windfall" of proceeding as one of two Tier I participants, rather than one of eight, that result is not

due to any unequal treatment or discriminatory application of the substantial compliance doctrine. That result is simply the consequence of the finding that Respondents had taken sufficient steps to substantially comply with the notice requirement of the Bankruptcy Court.[5]

Petitioner's argument that the provisions of the Stipulation, containing the notice provision, were intended to benefit its signatories is absolutely irrelevant. Petitioner cites no authority that would have precluded the Bankruptcy Court from applying the substantial compliance doctrine simply because the notice requirement arose from a "stipulated" order, as opposed to some other source. Just because there is a "contractual" element to a stipulation does not diminish the equitable power of a court to apply the doctrine of substantial compliance. Indeed, the Sixth Circuit noted that the substantial compliance doctrine is frequently applied in disputes under insurance contracts [App.5], so even if Petitioner had raised this argument, it would have made no difference in the court's approval of the use of substantial compliance doctrine to "stipulated" notice requirements.

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[5] Indeed, the Sixth Circuit noted that the potential "windfall" sought by Petitioner merited no protection whatsoever. [App.16]

CONCLUSION

None of the three "reasons" advanced by Petitioner in support of its Petition are compelling. Indeed, two of the three reasons were only raised for the first time in the Petition. The other reason, alleging a departure from "accepted practice", is totally bereft of support from any decisions of this Court or any other federal court. Petitioner does not even describe the so-called "accepted practice" from which it contends the Sixth Circuit deviated. Attempting to focus attention on cases involving late filings, as opposed to decisions applying the "substantial compliance" doctrine, Petitioner seeks to create the illusion of conflict among courts where none exists. The substantial compliance doctrine can continue to co-exist in harmony with Rule 9006(b) and each can be applied where warranted.

The application of the substantial compliance doctrine to the facts of this case was not unusual, and certainly did not give rise to any compelling need for this Court to become involved.

Based on all of the foregoing reasons, Respondents respectfully requests this Honorable Court deny the Petition.

Respectfully submitted,

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